VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

ROY PERRY-BEY and
RONALD M. GREEN,

Plaintiffs,

v. **Docket No.: CL19-3928**

CITY OF NORFOLK, et al.

Defendants.

ORDER SUSTAINING DEMURRERS

This is a suit by two citizens seeking an order directing the City of Norfolk to relocate a Confederate monument from Commercial Place in downtown Norfolk to a city cemetery. Plaintiffs allege that they appeared before the Norfolk City Council in 2017 asking that it relocate the monument and that the Council in fact passed a unanimous resolution to do so. The City Council has delayed acting on that resolution while legal issues involving Confederate monuments around the state are resolved. The Amended Complaint before the Court seeks a wide variety of relief, including money damages against each of the fourteen individual government officials named as defendants. The Court agrees with Defendants that the Amended Complaint fails to state any claim upon which relief can be granted and accordingly sustains the demurrers.

Procedural Posture

The litigation began with a *pro* se Complaint by Mr. Perry-Bey and Mr. Green on March 22, 2019, against the Norfolk City Council. That litigation was nonsuited on April 29, 2019, and immediately refiled in substantially similar form.

On June 3, 2019, Plaintiffs filed an Amended Complaint with the Court adding fourteen individual government officials as defendants and adding claims for money damages under 42 U.S.C. §1983. On June 21, 2019, all Defendants except the Attorney General collectively filed a

Demurrer and Special Plea. On July 3, 2019, the Attorney General, by counsel, filed a Special Plea, Motion to Dismiss and Demurrer. On July 15, 2019, all parties presented their oral arguments before the Court.

Factual Background

Plaintiffs Roy L. Perry-Bey and Ronald M. Green are residents of the Cities of Newport News and Norfolk, respectively. (Am. Compl. ¶2-3) Plaintiffs have named as Defendants the City of Norfolk, the Norfolk City Council, the Attorney General of Virginia, the Mayor and Vice Mayor of the City of Norfolk, each member of the Norfolk City Council, the Norfolk City Manager, the Norfolk City Clerk, the Norfolk City Attorney, and two lawyers in the City Attorney's Office. (*Id.* ¶4-10)

Plaintiffs allege that the display of the Confederate monument erected in 1898 (hereinafter "Monument") conveys and endorses a visual message of secession, representation of the Confederacy, slavery, lynching, violence, racial segregation, political intimidation, white supremacy, domestic terrorism, hate, crimes against humanity, the White League, Norfolk's White Citizens' counsel, and antisemitism. (*Id.* ¶18, 21, 29) Plaintiffs assert that these messages not only offend the Plaintiffs but represent a past and future danger to both the Plaintiffs' and the public's safety. (*Id.)*

Plaintiffs claim that they have to come into direct and unwelcome contact with the Monument and white supremacist hate groups, which give them offense, during their frequent public protests to remove the Monument. (*Id.* ¶19) They claim that have experienced a "special burden" and have altered their behavior to avoid contact with the Monument during their "business or visits downtown." (*Id.* ¶20) They claim to have suffered and continue to suffer injury as a result of the "illegal display" of the Monument on public property and Defendants' maintenance of this

"unconstitutional display of government regulated private hate speech from 1998 until present...for the express purpose to promote segregation and incite violence or prejudicial actions against the Plaintiffs, to disparage or intimidate, which also affects the public order and the peace and dignity of the City of Norfolk." (*Id.* ¶ 21, 22, 24)

Plaintiffs assert claims pursuant to 42 U.S.C. §1983. (*Id.* ¶ 1) This statute creates liability for any "person who, under color of [law], subjects...any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Plaintiffs also seek declaratory and injunctive relief as well as compensatory and punitive damages against each Defendant. (*Id.* ¶ 46-48)

I. Demurrer: Failure to Identify a Constitutional Violation

All Defendants except Attorney General Herring have demurred to the Amended Complaint for failure to state any claim upon which relief could be granted. They argue that Plaintiffs have failed to identify any right, privilege, or immunity secured by the Constitution and laws which has been deprived to them by any action of a Defendant.

The activity that is alleged to have caused injury to Plaintiffs is the continuous display of the visual message expressed by the Monument at its downtown location. Plaintiffs interpret the Monument to communicate a message of reverence for the Confederate cause, which they consider odious and offensive. These allegations regarding the nature of the Monument fully reflect the Monument's legal status as an instrument for government speech. As the United States Supreme Court held in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009):

> Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the

> construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure... A monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Id. at 470.

As offended as Plaintiffs undoubtedly are by this prominent reminder of a long history of racial oppression, they nonetheless have no First Amendment right to challenge the Monument based on any message that it conveys because the Free Speech clause does not regulate government speech. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467.

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *See Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229 (2000); *National Endowment for Arts v. Finley,* 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view"). Based on all this controlling precedent, the Court rejects Plaintiffs' assertions about a legal right to freedom from an unwelcome government message. (*e.g.,* Am. Compl. ¶ 28) Such a right may be protected not by a lawsuit but by the political process and the ballot box: "If the voters do not like those in governance or their government speech, they may vote them out of office or limit the conduct of those officials by law, regulation, or practice." *Sutliffe v. Epping,* 584 F.3d 314, 332 n.9 (1st Cir. 2009)(citing *Bd. of Regents v. Southworth,* 529 U.S. 217, 235 (1999)).

Next, Plaintiffs assert claims that their Fourteenth Amendment rights have been violated, as follows:

> The continued governments [*sic*] sponsorship and maintenance of the Confederate monument, the Seal of the Confederate States of American Monument, Confederate Standard-Bearer and engraved Confederate flag Display, constitutes white supremacy, segregation, religious bigotry, hate speech, antisemitism, and political or religious white supremacy practices in violation of the Supremacy Clause of the First Amendment and Fourteenth Amendment of the Constitution of the Virginia and of the Constitution of the United States of America and laws.

(Am. Compl. ¶ 29)

The procedural due process right guaranteed by the Fourteenth Amendment provides that no person shall be deprived of life, liberty or property without due process of law. Plaintiffs have failed to allege a deprivation of any liberty or property interest within the meaning of the Due Process clause. Plaintiffs have alleged that each of them has "altered their behavior to avoid direct and unwelcome contact" with the Monument but allege no facts detailing that they have had a life, liberty or property interest that has been impaired by actions of any of Defendants. (Am. Compl. ¶2-3)

The Fourteenth Amendment also prohibits states from denying any person the equal protection of laws. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985). Under the Equal Protection Clause, in order to state a race-based claim, Plaintiffs must allege that a government actor intentionally discriminated against them on the basis of their race. *See Hayden v. County of Nassau,* 180 F.3d 42, 48 (2d Cir.1999).

Plaintiffs have not alleged that the display of the Monument has subjected them to unequal protection of laws. Likewise, they have not alleged conduct by any Defendant that could be interpreted as intentional discrimination based on race. As a result, Plaintiffs have not alleged

that anything about the display of the Monument deprives the Plaintiffs of any right protected by the Due Process or Equal Protection clauses of the Fourteenth Amendment.

Additionally, in paragraphs 30-34 of the Amended Complaint, Plaintiffs include certain references to religion that the Court interprets as invoking a claim under the Establishment Clause of the First Amendment. They allege, "[t]he Display fosters an excessive entanglement between government religion and private hate speech." (Am. Compl. ¶ 34) The use of the phrase "excessive entanglement between ...religion" quotes the third prong of the three-part test articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) for determining whether a challenged government action violates the Establishment Clause: "[T]he statute must not foster 'an excessive entanglement with religion.'" *Id.* at 613 (citing *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970)).

Plaintiffs characterize the Monument as a religious display promoting the religion of "White supremacy." (Am. Compl. ¶ 32-22) The Court does recognize that Confederate symbols have been embraced by proponents of white supremacy. The horrifying events of Charlottesville 2017 and Charleston 2015 represent two recent examples of violence by white supremacists who displayed Confederate battle flags. The Court would not, however, conclude that belief in the supremacy of white people is a "religion" within the meaning of the Establishment Clause. Admittedly, courts have struggled to define which beliefs are "religious" beliefs for purposes of the Establishment Clause. *See, e.g., United States v. Seeger,* 380 U.S. 163, 176 (1965) ("a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God"); *Welsh v. United States,* 398 U.S. 333, 339 (1970) ("sincere and meaningful beliefs that ... need not be confined in either source or content to traditional or parochial concepts of religion").

The Court need not resolve whether white supremacy constitutes a religion to consider whether the Monument violates the Establishment Clause. In the recent decision of *Am. Legion v. Am. Humanist Assn.*, 139 S.Ct. 2067 (2019), the Plaintiffs argued that a granite cross erected in 1925 that has served as a memorial to forty-nine Maryland citizens killed in the First World War, represented a religious display that violated the Establishment Clause. The plaintiffs had sued the Maryland National Capital Park and Planning Commission eighty-nine years after the Bladensburg Peace Cross was dedicated, claiming that they are offended by the sight of its presence on public land and that the expenditure of public funds to maintain it violated the Establishment Clause. *Id.*

Ruling that the display and maintenance of the cross did not offend the Constitution, the Court retreated from the *Lemon* test for cases that involve the use of religiously-associated words or symbols for ceremonial, celebratory, or commemorative purposes. The Court instead suggested favoring a "presumption of constitutionality for longstanding monuments, symbols, and practices." *Id.* at 2082.

The Court reasoned that "these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult." *Id.* The Court noted that "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply . . . even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment." *Id* at 2083. The Court concluded:

> These ... considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

Id. at 2085.

The association between a cross and Christianity is much closer than any association between a Confederate symbol and a religion, yet the Supreme Court determined that the display of a cross as a historical war memorial did not offend the Establishment Clause. Therefore, this Court rules that the City's maintenance and display of the Monument, whether it has religious connotations or not, likewise does not offend the Establishment Clause.

II. Additional Grounds for Dismissing Section 1983 Claims

Defendant Herring raises additional and different grounds in support of his demurrer. In the style of the case, Plaintiffs list each of Defendants' names and at the end of the list state "In Their Official Capacities." (Am. Compl. p.1). Also, in paragraphs 2-10 of the Amended Complaint, Plaintiffs detail the official capacities of each of the named Defendants. The Amended Complaint includes no allegation of any individual or personal act or omission by any Defendant that caused harm to Plaintiffs.

The United States Supreme Court has held that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). A suit cannot, however, be brought against a state official or a state itself pursuant to 42 U.S.C. § 1983 because "a State is not a person within the meaning of § 1983" and a state has sovereign immunity from suit under § 1983. *Id.* at 64, 67. A suit may only be brought against a government official pursuant to 42 U.S.C. § 1983 when sued in his official capacity, if the official has "some degree of personal involvement in the alleged deprivation of rights." *McDonald v. Dunning*, 760 F. Supp. 1156, 1160 (E.D. Va. 1991) (citing *Vinnedge v. Gibbs*, 550 F.2d 926, 928-29 (4th Cir. 1977)).

As the Court has detailed *supra*, Plaintiffs have not alleged any personal involvement of any Defendant in depriving the Plaintiffs of any rights. The Amended Complaint lacks any allegation describing any conduct by any individual Defendant that could be construed as harmful to Plaintiffs. For this additional reason, the Plaintiffs' claim under 42 U.S.C. § 1983 fail.

III. Plaintiffs have no individual standing

Defendant Herring additionally relies on his argument that Plaintiffs lack standing to assert any alleged claims relating to the Monument. The Court has concluded that the Amended Complaint fails to state a cause of action for which relief may be granted, as argued by the other Defendants. To the extent, however, that it could be interpreted as including actionable claims, the Court agrees with the Attorney General that Plaintiffs nonetheless have no standing to assert such claims.

In determining whether a plaintiff has standing, which is a threshold issue and a question of law, courts consider the factual allegations as true. *Howell v. McAuliffe*, 292 Va. 320, 330, (2016)(citing *Virginia Marine Res. Comm'n v. Clark*, 281 Va. 679, 686–87, (2011)). Thus, "[i]t is incumbent on petitioners to allege facts sufficient to demonstrate standing." *Howell v. McAuliffe*, 292 Va. 320, 330, (2016)(citing *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38, 50, 743 S.E.2d 132, 138 (2013)).

> The concept of standing concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case. In asking whether a person has standing, we ask, in essence, whether he has a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed.

Cupp v. Board of Supervisors of Fairfax County, 227 Va. 580, 589 (1984) (internal citation omitted); *see also Grisso v. Nolen,* 262 Va. 688, 693 (2001); *Goldman v. Landsidle,* 262 Va. 364, 371 (2001).

Under Virginia law, a party has standing if it can "show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest." *Harbor Cruises, Inc. v. State Corp. Comm.,* 219 Va. 675, 676 (1979) (per curiam). In other words, without "a statutory right, a citizen or taxpayer does not have standing to seek...relief ... unless he [or she] can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large." *Goldman v. Landsidle*, 262 Va. 364, 373 (2001). The Supreme Court has firmly rejected the notion that offense alone qualifies as a "concrete and particularized" injury sufficient to confer standing. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). "Offended observer standing is deeply inconsistent, too, with...the rule that generalized grievances' about the conduct of Government" are insufficient to confer standing to sue." *Am. Legion v. Am. Humanist Assn.*,139 S.Ct. 2067, 2100 (2019) (Gorsuch, J., concurring) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). All of Plaintiffs' alleged injuries result from the mere existence of the Monument and are not "separate and distinct from the public at large." *Goldman*, 262 Va. at 373. The harms alleged could also be claimed by any member of the public who walks by the Monument.

CONCLUSION

The source of the injuries claimed by Plaintiffs is the continued display of the Monument, which the Court rules is a form of government speech. Because government speech is not subject to constitutional challenge under either the First or Fourteenth Amendments, the Amended

Complaint fails to state an actionable claim. To the extent that any such claim could be discerned from the pleading, none of the defendants named herein have participated personally in depriving Plaintiffs of any constitutional right; and the causes of action under 42 U.S.C. § 1983 therefore fail. Finally, Plaintiffs lack standing to assert claims of injury based on the continued presence and display of a Monument that has stood in the same location for more than a century.

The Demurrers of all Defendants are SUSTAINED. The Amended Complaint is DISMISSED.

The Clerk is directed to mail a copy of this Order to the unrepresented parties and to all counsel of record.

Pursuant to Rule 1:13, endorsements are waived. Plaintiffs and counsel may submit written Objections to this Order within ten days.

It is so ORDERED.

ENTER: 22 July 2019

Mary Jane Hall

MARY JANE HALL, JUDGE

The Foregoing Document Copy Teste:
George E. Schaefer, Clerk
Norfolk Circuit Court
BY Tracey Staples
Tracey Staples, Deputy Clerk
Authorized to sign on behalf
of George E. Schaefer, Clerk
Date: July 23, 2019